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Mason Ladd

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THE RELATIONSHIP OF THE PRINCIPLES OF EXCLUSIONARY RULES OF EVIDENCE TO THE PROBLEM OF PROOF

By MASON LADD*

IN the recent case of *Funk v. United States*¹ the Supreme Court cast aside the ancient common law rule which has prevailed so long in the federal courts, that the wife of a defendant on trial for a criminal offense is incompetent as a witness in his behalf. Holding that the common law is flexible and adapts itself to varying conditions in our social order, Mr. Justice Sutherland delivered the opinion of the court² reversing the judgment of the circuit court of appeals which had affirmed a conviction of the defendant in the federal district court, in which the defendant had been denied the right to call his wife as a witness on the ground of common law incompetency. In reaching its conclusion the court had to expressly overrule its former decisions in the cases of *Jim Fuen Moy v. United States*³ and *Hendrix v. United States*,⁴ and to reject the position taken in the early case of *United States v. Reid*⁵ that the federal courts in criminal cases were bound by the rules of evidence in force in the respective states when the federal courts were established by the Judiciary Act of 1789. In support on principle of the decision are the cases of *Benson v. United States*⁶ and *Rosen v. United States*,⁷ the former expanding the common law conception of competency to include the testimony of a co-defendant in a criminal case in which the defendants were tried separately, and the latter removing the incompetency of one previously convicted of a felony. Modern

*Professor of Law, College of Law, State University of Iowa, Iowa City, Iowa.

¹(1933) 54 Sup. Ct. 212.

²Mr. Justice Cardozo concurred in the result only. Mr. Justice McReynolds and Mr. Justice Butler dissented without written opinion.

³(1920) 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. 214. In the same year the supreme court of Illinois decided in accord with this case and contrary to the Funk Case in absence of statute. The state of facts offered greater opportunity to reach the proper rule as announced in the Funk Case. See, *People v. Holtz*, (1920) 294 Ill. 143, 128 N. E. 341.

⁴(1910) 219 U. S. 79, 31 Sup. Ct. 193, 55 L. Ed. 102.

⁵(1851) 12 How. (U.S.) 361, 13 L. Ed. 1023.

⁶(1892) 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

⁷(1917) 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406.

legislation in England and in most of the states of this country has long ago removed the common law barriers to such testimony, but the federal courts have been without aid of congressional legislation in the expansion of the common law doctrine in these cases. The opinion in the *Funk Case* is particularly significant, not only because of the wisdom of the court's decision but more so because of the court's assertion of its power and willingness to liberalize the rules of evidence so as to accord with the growing experience of society and its fundamentally altered conditions. The spirit⁸ of this opinion further aligns the federal courts with the modern tendency in the field of evidence to remove barriers to the admissibility of testimony and competency of witnesses in the desire to place before the triers of facts all relevant testimony and to permit the reasons which formerly established exclusionary rules now to be used to test credibility and to aid in evaluating testimony.

Whether there is a danger in opening the doors of evidence and admitting all relevant proof, irrespective of its possible misleading characteristics, or of the likelihood of a witness to falsify or to be in error, depends in a large measure upon how effectively the principles which established the exclusionary rules can be used with the jury to test the admitted testimony. In almost every case in which an incompetency under the common law or restriction upon admissibility has been abolished the courts have emphasized the use of the reasons for exclusion as a guard against an improper acceptance or application of the evidence received.⁹ In the *Benson Case* Mr. Justice Brewer said,

"In the opinion, (1933) 54 Sup. Ct. 212, 215, Mr. Justice Sutherland stated, "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And, since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule. That this court and other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist, we think is not fairly open to doubt."

⁸Best, Evidence, 12th ed., 131-132. 1 Wigmore, Evidence, 2d ed., sec. 576. 5 Jones, Evidence, 2d ed., sec. 2127. *Reagan v. United States*, (1895) 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709; *Firth v. Briarton*, (1927) 170 Minn. 472, 212 N. W. 805. *Gibson v. Gray Motor Co.*, (1920) 147 Minn. 134, 179 N. W. 729. The Iowa, Code 1931, provides in sec. 11255, "Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility."

" the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion."¹⁰

The courts mention but do not explain or discuss the methods of the new use of the exclusionary principles to test weight and credibility and until recently little emphasis has been placed upon the analysis of these principles in their relationship to the problem of proof. The subject of proof and evaluation of testimony becomes increasingly important with the new additions of admissible evidence and, as Professor Wigmore has said, has been almost entirely neglected in the study of the law.¹¹ The source of this study could be varied and might not involve the exclusionary rules at all.¹² Much, however, can be derived from them, and it is the object of this article to discuss the relationship and value of the principles of competency and admissibility to the solution of the problem of proof. How may those principles be used to determine questions of fact? How will the *Funk Case* affect federal criminal trials, and how can the district attorney prevent the jury from giving the testimony of the accused's wife credit beyond its true worth?¹³ Can the same principles urged to the court to exclude testimony be effectively presented to the jury to evaluate it? Will the use of the principles which caused the court to admit the evidence or recognize the witness better enable the jury to appreciate the affirmative value of such testimony? Except in the case of the most artificial barriers¹⁴ in evidence it is believed there is a

¹⁰(1892) 146 U. S. 325, 336, 13 Sup. Ct. 60, 63-64, 36 L. Ed. 991, 996.

¹¹Wigmore, *Principles of Judicial Proof*, 2d ed., 3.

¹²Professor Wigmore in his *Principles of Judicial Proof*, 2d ed., has treated the subject of evidence as commonly known and the subject of proof totally apart from each other. In commenting upon the method of use of his new book, on page 6 he states, "Do not attempt to invoke mentally any of these *exclusionary rules* of Admissibility commonly thought of as rules of evidence. Keep them out of the ratiocinative process. Think of the problem as a juror would think of it if the evidence were safely in the case and the counsel were arguing to him about it. What we are aiming to analyze is the actual mind-to-mind process of persuasion and belief." This book has a real value in introducing a new type of thinking and approach upon the problem.

¹³For discussion of this problem see *infra* text to footnote 36.

¹⁴Professor Wigmore, in his *Principles of Judicial Proof*, 2d ed., p. 6.

close relationship between proof values and principles of admissibility. Numerous problems taken from the law of evidence fully illustrate this. In a great number of situations where the exclusionary rules have been removed by statute or judicial decisions, or are escaped by exceptions, the principles applied to exclude or admit become the new sources of determining the value of the admitted testimony or the credit which a witness is entitled to receive in judging his accuracy and veracity.

THE HEARSAY RULE AND TESTIMONIAL VALUES

Professor Thayer laid down as a preliminary precept governing the law of evidence that "unless excluded by some rule or principle of law, all that is logically probative is admissible."¹⁵ The probative and relevant character of offered testimony is usually the first consideration, and if pertinent to the issues it is submitted to the tests of the exclusionary rules. These tests may prevent the testimony from being received in the trial, and in that event, of course, the offered testimony has no place in the ultimate problem of proof. On the other hand, the exclusionary rule may have fallen into disrepute and the evidence be admitted, or there may be an exception to it into which class the testimony falls, in which event it performs its part in the proof problem. In the case of the hearsay rule of exclusion the law prohibits the admission of hearsay testimony, but creates many exceptions into which certain classes of hearsay may fall, and thus become a part of the testimonial proof. It may be said that the lack of the test of cross-examination and the fact that the party making the reported statement was not under oath¹⁶ at the time the statement was made are principal reasons for the rule, yet back of these is the practical effect that the admission of hearsay would permit the operation of too many sources of inaccuracy, fraud, and untrust-

states, "All of the artificial rules of admissibility might be abolished, yet the principles of proof would remain so long as trials remain as the rational attempt to seek truth in legal controversies." That there are many rules of evidence which are artificial, founded upon fanciful grounds and should be changed is conceded. Every teacher of evidence has his selected number of them ready to be discarded, and some day it is hoped they will be. The far greater number of the rules of evidence are believed to be based upon sound reasoning directed to cause juries to investigate and determine questions of fact by rational methods rather than through passion, prejudice and consideration of non-consequential and unreliable material. See 1 Wigmore, *Evidence*, 2d ed., p. 126-127. Compare footnote 12, *supra*.

¹⁵Thayer, *Preliminary Treatise on Evidence* 265.

¹⁶3 Wigmore, *Evidence*, 2d ed., sec. 1362.

worthiness. Justice Weaver, of the Iowa court, in commenting upon hearsay states that the grounds of its exclusion are thus,

"Its inadmissibility arises from its essential nature. Its very name or definition presupposes some better testimony which ought to be produced.

Such evidence is intrinsically weak and fails to satisfy the impartial mind. It affords a cover to fraud and gives to the unsworn statement of one person of matters which are repeated by another, whose bias or failure to understand or whose imperfection of memory may vitally affect its real meaning and import, the same dignity and quality which we give to testimony taken under oath in a solemn judicial proceeding."¹⁷

Exceptions to the hearsay rule are established because it is said that this normally unsatisfactory evidence has in the particular exception qualities which enhance its trustworthiness, and then the admission is justified upon the doctrine of necessity. Thus the reasons for establishing the hearsay rule in the first place, and then for creating an exception to it, are both concerned with the probative qualities of such testimony, and it is but natural that the same reasons are suited for the task of estimating the worth of the testimony admitted through the exception and provide an approach to the ultimate problem of proof.

a. *Dying Declarations*.—An application of the principles of admissibility to test the value of the testimony admitted under the exception of dying declarations shows the close connection between the two. In a case in which B is accused of the murder of A, C may testify to the remarks made by A concerning the killing if made by A under circumstances bringing them within the class of dying declarations. C's testimony is only about what A said and is used to prove the fact stated, for example, that "B has killed me." Is the fact stated by A and reported by C true? The theory of the law against the admissibility of hearsay generally has been heretofore discussed. The theory in favor of admitting dying declarations in homicide cases is generally that

¹⁷State v. Beeson, (1912) 155 Iowa 355, 360, 136 N. W. 317, 319. Professor Wigmore regards the risk of incorrect transmission, the intrinsic weakness, the requirement of personal knowledge, and the idea of anonymous utterances, all as spurious theories of the hearsay rule. 3 Wigmore, Evidence, 2nd ed., sec. 1363. Although his test of lack of cross-examination is a principal reason for the hearsay rule, the other reasons urged by the courts give valuable light upon the solution of the problem of proof in testing evidence admitted under exceptions.

¹⁸The King v. Perry, [1909] 2 K. B. 697 78 L. J. K. B. 1034, State v. Mueller, (1913) 122 Minn. 91, 141 N. W. 1113, Underhill, Criminal Evidence, 3rd ed., ch. 17 Brown v. Commonwealth, (1873) 73 Pa. St. 321, 13 Am. Rep. 740. See comment, (1928) 12 MINNESOTA LAW REVIEW 541.

the statements, made concerning the cause and circumstances of the killing and uttered when all hope of life has been abandoned and the speaker believes he is soon to die, have a circumstantial guarantee of trustworthiness in that with the awe of approaching death a person would not want to die with a lie upon his lips.¹⁸ The further reason for admission is the principle of necessity which is requisite to all hearsay exceptions in varying degree.

Thinking of the inquiries which arise in determining the exclusionary rules in terms of judging testimonial values should show the relevancy or non-connection of one to the other. The following questions all relate to the matters pertaining to exclusion and admissibility; do they likewise point to issues concerning the value of C's testimony in the ultimate problem of proof on the issue, "Did B kill A?"

(1) Questions arising from the general hearsay objection. Did C have personal knowledge of the truth of the testimonial fact asserted?¹⁹ Did C correctly understand what A in fact said? Does C now remember the statements which A made? Can C give an accurate report of A's statement? Will the report be distorted by C's attitude, preconceived opinions, or bias? Is there a danger of fabrication by C because of some ulterior motive? Can C be cross-examined as to matters which A alone personally knew? Was A's statement made upon oath?²⁰ These questions point out the dangers of hearsay generally and the causes of its questionable reliability. Some of the reasons indicated are better supported than others, but all emphasize the weakness of the probative character of hearsay because of its being at best second hand testimony subject to all possible resulting imperfections. Under varying factual situations different reasons might reflect more clearly the particular infirmity in the hearsay testimony offered. The result of the analysis applied in the ordinary case of hearsay testimony would keep the testimony out altogether, but in the event that the facts come within the exception they will be admitted. It is in case of the exception to the rule that it is believed these reasons, in support of the general rule of exclusions, repeat

¹⁹The necessity of personal knowledge as a qualification of a witness to testify was essential apart from the hearsay rule. Thayer, *Preliminary Treatise on Evidence*, 18, 499. 3 Wigmore, *Evidence*, 2nd ed., sec. 1364. It also supports the hearsay rule, which excludes testimony of what another said about a fact in issue, the witness offering the testimony having no personal knowledge of that about which he proposes to testify.

²⁰*People v. Kraft*, (1896) 148 N. Y. 631, 43 N. E. 80.

themselves as tests of the admitted evidence. The considerations so far have dealt with the use of reasons for keeping out evidence as discrediting the quality of evidence if admitted, now we shall consider the use of the principles establishing the exception and admission of hearsay as also fixing the points of inquiry in estimating the probative force or value of the testimony thus admitted.

(2) Questions involving principles authorizing admission, under an exception to the hearsay rule. Is A's statement trustworthy? Was A under oath when he made it? What circumstances existed at the time the statement was made which would naturally cause A to speak the truth? Did A, when he made the statement, realize that death was certain and soon to come? Was A's statement made with the solemnity to be expected of one about to die? Was A's statement only casual and made without appreciating the consequences of misstatement? Was it made with the same degree of seriousness as if made upon oath in open court? Did A have such a belief regarding the hereafter that the apprehension of impending death would cause him to declare only the truth²²¹ Was A an irreverent person with feelings of malice or hatred towards B so that approaching death might incite the desire to injure B rather than express the truth²²² Was A, in making the statement, attempting to excuse and justify his own misconduct? Was A endeavoring to revenge himself upon those who injured him? Was A in a position to know the truth about that of which he spoke? Was his statement based upon personal knowledge? Was it only his opinion founded upon collateral matters or reasoning²²³ If A were alive, and the trial was for an assault rather than his murder, would he be permitted to testify to the fact which C says that A stated? This group of questions raises the considerations pertinent to the determination of the admissibility of dying declarations as an exception of the hearsay rule. While the testimony offered by C may meet the tests required to admit it and thus place before the jury the statement made by A, this does not say what will be done with the statement in the deliberation upon the ultimate issues of the case. It may

²²¹State v. Rozell, (Mo. 1920) 225 S. W. 931, 16 A. L. R. 400, 411. State v. Elliott, (1877) 45 Iowa 486, Gambrell v. State, (1908) 92 Miss. 728, 46 So. 138.

²²²Carver v. United States, (1897) 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602.

²²³Note, Impeaching or Discrediting Dying Declarations, 16 A. L. R. 411, State v. French, (1926) 168 Minn. 341, 210 N. W. 45, The State v. Wilks, (1919) 278 Mo. 481, 213 S. W. 118.

be that enough elements are present to bring the statement within the exception so as to escape the hearsay rule, but how much weight and credit is to be given to the assertion of A? This is the problem of proof. It is reasonable to believe that those factors which provided the escape from the exclusionary rules are the same factors which should be emphasized to establish the credibility of the testimony, and likewise that they single out the points of attack to defeat the credibility along with the objections to hearsay testimony generally. If this is true, it shows that the principles of admissibility and the problem of proof are not so far apart and that in the study of one the student or lawyer should be ever mindful of the other and should always be conscious of the dual task the principles of admissibility in many cases perform. While not fixing the form of a proof formula they determine the substance and fundamental principles upon which any process of reasoning must necessarily draw.

b. *Other Hearsay Illustrations.*—A brief review of other real or apparent exceptions to the hearsay rule, mentioning some of the proof testing issues raised under the principles of admissibility, shows further the dual function of the latter. The doctrine of the admission of extrajudicial statements as *res gestae* calls into play nearly all of the questions presented in respect to dying declarations, except that lack of time to deliberate or to permit rationalization upon the consequences of the statement before making it is the guaranty of trustworthiness and the stimulus to veracity²⁴ rather than approaching death. Whether *res gestae* is admitted because it is regarded as a part of the act itself²⁵ or because it is a spontaneous utterance²⁶ free from sinister motives, it is admitted because the circumstances of the case entitle it to credit rather than any special credit being reposed in the speaker. Spontaneity of the statement as distinguished from a narrative of fact or condition give the declaration testimonial recognition.²⁷ If the statement is used to prove the truth of the utterance, which is an issue in the case, it comes in as an exception to the hearsay rule.

²⁴ Wigmore, Evidence, 2nd ed., secs. 1766, 1768, 1747, 1757

²⁵ Thayer, Preliminary Treatise on Evidence 521, 523.

²⁶ Wigmore, Evidence, 2nd ed., secs. 1749, 1757

²⁷ Hedlund v. Minneapolis St. Ry. Co., (1913) 120 Minn. 319, 139 N. W. 603, Keller v. The Town of Gilman, (1896) 93 Wis. 9, 66 N. W. 800, Morner v. Kohen, (1927) 172 Minn. 543, 216 N. W. 233, Field v. North Coast Transportation Co., (1931) 164 Wash. 123, 2 P. (2d) 672, 76 A. L. R. 114, note 1121, Jones, Evidence in Civil Cases, 3rd ed., sec. 345.

All of the general objections to hearsay testimony heretofore discussed, point out the places for testing the value of this proof. Likewise, the reasons for admitting this testimony under the exception contain the elements which give the statement reliable probative character, and also give the clues for detecting its weakness. Spontaneity may prevent a premeditated fabrication of testimony, but it does not prevent an utterance from reflecting the nature, the attitude, the subconscious bias, or other influencing forces which might cause the declarant inaccurately or even falsely to report facts. The spontaneity causes the utterance to be possibly as much a reflection of the individual as it is of the facts and circumstances causing the utterance. Some people habitually blame others for things for which they themselves are at fault. Some people are in the class of those who are always right and the other person wrong. Some people, because of their experiences and associations, see facts always in the light of these influences, and their declaration would be in accord with them. In other instances the exclamation may be, as the reason for the admittance of the testimony assumes, a natural reaction stimulated by the circumstances and expressing a true statement of facts. All of these factors and many others considered under the principles of admissibility disclose the factors which are to determine the credibility and value of this testimony

Again, in the case of declarations of pedigree or of family history,²⁸ statements of one not in court are admitted as exceptions to the hearsay rule upon the circumstantial guarantee that the natural conversations of those within a family who talk over family affairs ante litem motam, on occasions where there is no special reason for fabrication, are likely to be statements of the truth and therefore admissible to prove the facts stated respecting pedigree. Here again the basis of the exception is qualities which make for reliability and which the party using the testimony should emphasize to establish belief on the part of the triers of fact of this testimony. But also the grounds of admission show the points of attack, not only to keep the testimony out but also to weaken it if admitted. They suggest the possibilities of this testimony having been made when the declarant was exposed to bias or other ele-

²⁸1 Wigmore, Evidence, 2nd ed., ch. 49.

²⁹United States v. Cotter, (C.C.A. 2nd Cir. 1932) 60 F. (2d) 689; E. I. Du Pont De Nemours & Co. v. Tomlinson, (C.C.A. 4th Cir. 1924) 296 Fed. 634, compare Radtke v. Taylor, (1922) 105 Or. 559, 210 Pac. 863.

nents which would distort the truth. They point to the tests, Were the "natural effusions" natural? Was the "effusion" from relatives who had accurate means of knowledge? Was the family gossip just gossip, or did it have a chance of reliability from the source of the effusion?

Taking another illustration, that of regular entries and books of account as exceptions to the hearsay rule,²⁹ such records are believed to have a strong probative value, and those reasons which permit this evidence to avoid the hearsay rule are strong factors in giving such records high evidential respect. Questions raising these principles demonstrate this. Does the system and habit of making a record with regularity have a natural tendency to prevent inaccuracies? Assuming the employee is honest, is it easier to report what is true than what is false? Would an error in the record entries in the regular course of business transactions be likely to be discovered? Would the possibility of detection act to prevent the commission of errors? Would the risk of censure by an employer create a forceful motive in the party making the record not to make mistakes? Would the likelihood of detection of error tend to prevent the temptations for dishonesty to materialize? The result of such inquiries not only establishes a proper exception and admission of the testimony but contains reasons which could properly be employed in causing the triers of fact to respect the probative value of regular entries and books of account. However, these reasons for admission also show the lines of attack upon their reliability. Can it be said that regularity in making records makes error impossible? Although the likelihood of discovery may cause employees to be careful, is the case at hand not the one in which discovery was in fact made? Is the stimulus to an employee of not wanting to be found in error infallible in securing accurate results? Can system and regularity prevent the possibility of a daring or dishonest employee from falsifying the records? The reasoning involved in the principles upon admissibility, therefore, deals directly with the problem of proof as well.

Many other illustrations taken from the exceptions of the hearsay rule could be used to demonstrate the point that has been made. An analysis of this rule shows the problem of proof in terms of admissibility and shows that a conception of the principles of evidence necessarily creates conceptions as to proof values. If, as in continental Europe,³⁰ we should abolish the ex-

³⁰See Professor Wigmore's critical comment upon handling the problem

clusion of this sort of testimony, it could not be claimed that the reasons creating untrustworthiness ceased to exist, nor that hearsay testimony at once obtained a purified quality as a probative force. At most it could be said that objectionable testimony is to be received for what it is worth, and the reasons formerly used to test its admissibility would then test its value. In a similar way the principles supporting the hearsay rule aid in determining the reliability of the testimony admitted under exceptions, and the reasons for the exceptions are the same reasons which both give the admitted testimony strength and point out further elements to measure its worth in solving the problem of proof.

COMPETENCY OF WITNESSES AND TESTIMONIAL VALUES

The incompetency of witnesses to testify is based upon historical developments, social considerations, and testimonial reliability. Many of the disqualifications of the early common law have been eliminated or modified by statute or judicial decision, thus permitting many persons to testify who formerly were prohibited from assuming the role of witnesses in trial proceedings. Those ideas, reasons, or principles which formerly resulted in rendering the witness incompetent may, since the elimination of the disqualification, afford tests for evaluating the testimony given by these witnesses.

a. *Disqualification Because of Interest.*—It was long³¹ a rule that a person interested in the outcome of the litigation was incompetent to testify, and even in this modern age the rule exists in the case of the dead man's statutes which generally exclude one interested in the litigation from testifying as to communications or transactions with deceased persons. The same reasons which have abolished the disqualification of parties in interest in actions inter vivos should apply in actions against the estate of deceased persons.³² Yet we recognize this distinction³³ apparently

of proof in continental Europe. *Principles of Judicial Proof*, 2nd ed., 4. For discussion on the free proof system of Europe as opposed to Anglo-American technical system of evidence, see Ferrari, *Political Crime and Criminal Evidence*, (1919) 3 MINNESOTA LAW REVIEW 365-80.

³¹*Queen v. Muscot*, (1713) 10 Mod. 192, *Reeves v. Symonds*, (1714) 10 Mod. 291, 1 Wigmore, *Evidence*, 2nd ed., secs. 575-577

³²1 Wigmore, *Evidence*, 2nd ed., sec. 578, *Chamberlain*, *Evidence*, sec. 3670.

³³*Mason's* 1927 Minn. Stat., sec. 9817. The Minnesota courts have given their "dead man" statute a broad interpretation and have approved the spirit of it. *Kells v. Webster*, (1898) 71 Minn. 276, 73 N. W. 962;

upon the theory that if a party gets a good chance without much chance of discovery he will fabricate, falsify, and perjure to promote his interest. Death of the adverse party is deemed to create this chance, so that the law, in order to protect dead men's estates from false claims, sacrifices the just claims of the living by the iron clad prohibition against an interested person giving testimony. Archaic as the principles may seem, they do give some significance to the connection of interest and the trustworthiness of a witness's testimony. This is, of course, recognized generally, and the extent of the influence of interest on testimony depends upon the witness and the case. Notably in criminal cases the interest of the defendant in obtaining freedom has caused the concoction of many an alibi.³⁴ Likewise, it is undoubtedly true that the interest in the outcome of a civil suit has induced many an unscrupulous person to falsify upon the witness stand. But the danger of interest often rests with the honest person as well, and frequently it controls his perspective, attitude, and bias to such an extent that his testimony may be anything but the truth. People are prone to see their side of the story and discredit things unfavorable. The common law regarded this so strongly and considered interest as such a stimulus to fraud, deception, and perjury that the interested witness was held incompetent. This disqualification being abolished, except the lone relic of the dead man statute, do the reasons which once caused a refusal to accept the testimony now aid in evaluating it?³⁵ If the dead man statutes were repealed, would the reasons for their existence, including the fact that the decedent was not present to tell his side of the story, become truth testing elements in the examination of the admitted testimony? Does not the use of these principles in testing credibility create a valid reason for repeal of the dead man statute in the interest of the honest claims of the living?

Dougherty v. Garrick, (1931) 184 Minn. 436, 239 N. W. 153, comment, see (1932) 17 Iowa L. Rev. 549-52. Some courts have construed the statute narrowly and have expressed disfavor of it. *Corbett v. Kingan*, (1917) 19 Ariz. 134, 166 Pac. 290; see comment, (1923) 7 MINNESOTA LAW REVIEW 414.

³⁴The statutory abolishment of the incompetency of the accused in criminal cases came long after the removal of the disqualification because of interest. It was first declared in Maine in 1864. It reached England in 1889 and is universal in America with the exception of Georgia. 1 Wigmore, Evidence, 2nd ed., sec. 579; Mason's 1927 Minn. Stat., sec. 9815.

³⁵Interest may properly be shown to test the credibility of a witness. *Firth v. Briarton*, (1927) 170 Minn. 472, 212 N. W. 805, *Gibson v. Gray Motor Car Co.*, (1920) 147 Minn. 134, 179 N. W. 729.

b. *Other Disqualifications.*—For a variety of reasons, but perhaps principally because of the possible untrustworthiness of the witness, the common law regarded one spouse incompetent to testify for or against the other.³⁶ Statutes have modified this disqualification in many ways. Most of them now permit the husband or wife to testify for each other but will not compel one to testify against the other except in special cases.³⁷ The social desirability of marital tranquility and the maintenance of a happy home life are undoubtedly the basis of the statutes.³⁸ In those cases in which the husband or wife does testify for the other we have brought into play all of the ideas motivating the common law exclusion of such witnesses. Are the interests of the husband and wife identical? Is the relationship between them so intimate, are affections so strong, the problems of life which they must undertake together so unified that a bias is created which prevents testimonial reliability? Does fear enter into this trial picture, not fear of an early time wife beating, but fear of the dissensions which might arise from adverse testimony, fear of a disturbance of home happiness, fear of losing the confidence of the other? The effect or application of such principles is of course variable, depending upon the persons and the kind of cases. Perhaps in most instances the marital relation would not cause intentional falsification, at least when the spouse may avoid testifying. This relationship as a truth testing factor does, however, have a very decided bearing upon perspective, attitude and bias. The considerations of the matters relating to competency because of marriage contain about all that may be said upon credibility in solving the problem of proof and offer a valuable contribution to it.

Turning to another previous ground of incompetency, we find the law expressly stating that the condition which denied the witness the right to testify is now used exclusively for the purpose of testing credibility. This is in the case of one previously convicted of a felony.³⁹ At the common law this disqualified the witness.

³⁶*Funk v. United States*, (1933) 54 Sup. Ct. 212; *Jin Fuey Moy v. United States*, (1920) 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. 214, *Hendrix v. United States*, (1910) 219 U. S. 79, 31 Sup. Ct. 193, 55 L. Ed. 102; *People v. Holtz*, (1920) 294 Ill. 143, 128 N. E. 341. 5 Jones, Evidence, 2nd ed., sec. 2128. 1 Wigmore, Evidence, 2nd ed., secs. 601-603.

³⁷Mason's 1927 Minn. Stat., sec. 9814.

³⁸For criticism of this doctrine, see Hutchins and Slesinger, Some Observations on the Law of Evidence, Family Relations, (1929) 13 MINNESOTA LAW REVIEW 675-686. See also, *Funk v. United States*, (1933) 54 Sup. Ct. 212.

³⁹Mason's 1927 Minn. Stat., sec. 9948. Most states have similar statutes.

Today previous conviction of a felony is admitted expressly for the sole purpose of testing credibility⁴⁰

Obviously, all incompetency or privilege is not based upon a consideration of testimonial qualification. In the case of the privileges of attorney-client, of doctor and patient, and of priest and penitent, we find that the origin of the privilege has nothing to do with the untrustworthiness of the testimony but that it is based upon the social desirability of protecting these respective relationships in the interest of the general good to the public.⁴¹ But in many situations the principles relating to competency are so associated with the problem of credibility that those principles become the most important considerations in evaluating testimony given by the witnesses once the incompetency is removed. The effect of these considerations is difficult to estimate by any fixed formula applicable to all cases. They are the intangible elements but produce tangible results in creating impressions, in testing values, and in bringing the triers of fact to a fixed conviction upon ultimate issues presented to them.

FURTHER RELATIONSHIP OF THE PRINCIPLES OF EVIDENCE TO THE PROBLEM OF PROOF

There is perhaps no limit to the number of illustrations which might be used to show that the problems of evidence ordinarily considered provide a background for properly placing and dealing with the testimony in the ultimate problem of proof. After all, this has been substantially the only training which attorneys have had in the past, specifically relating to the problem of proof, and it has undoubtedly been generally regarded as proper preparation

But see *Rosen v. United States*, (1918) 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406. As to whether the specific felony may be shown, see *State v. Friend*, (1930) 210 Iowa 980, 230 N. W. 425. As to the theory of this former incompetency, 1 Wigmore, *Evidence*, 2nd ed., secs. 519-524.

⁴⁰Testimony showing previous conviction of a felony sometimes greatly exceeds its intended purpose of testing credibility. In the criminal case it undoubtedly creates an impression of the probability of the defendant's guilt as well as impeaches his veracity. If the defendant's witnesses are shown to have been previously convicted of a felony, it may test the truth of their testimony, but it also may tend to show that the defendant was associated with criminals and cause the jury to infer that he was one also. In civil cases it causes the jury to look twice when the embarrassing question has been asked of a witness who upon direct examination may have created a favorable impression. Yet it is quite conceivable that a previous conviction in some cases would have nothing to do with a person's credibility.

⁴¹5 Jones, *Evidence*, 2nd ed., sec. 2156. 5 Wigmore, *Evidence*, 2nd ed., sec. 2285.

for learning how to deal with proof. While there is room for great progress in developing new approaches to the problem of proof as a distinct subject, it is believed that emphasis of the principles of admissibility in their relationship to the problem of proof may help to fill a gap between the two. Nearly every part of the law of evidence deals with methods of proof and to a considerable degree has relation to the value of testimony admitted. Other subjects not heretofore referred to as performing this task are the doctrine of judicial notice, the subjects of presumptions, inferences, *prima facie* case, and the burden of proof, circumstantial evidence, the problem of relevancy and materiality, real evidence, expert testimony, and character testimony. The integration theory of the parol evidence rule is based upon evidential intent, and the best evidence rule is founded upon the desire to obtain the highest quality of proof available. All of these make a contribution not only for the mechanics of obtaining the admission of such proof and methods of presenting the testimony but also in respect to what the testimony may be counted upon to accomplish in the trial of the law suit. A study of the examination of witnesses, while dealing with the methods of examination, likewise deals with the proof problem. For example, the reason leading questions are objectionable is that the suggested answer in them may not be the true answer of the witness.⁴² Much has been accomplished also in respect to the science of finger prints,⁴³ ballistics,⁴⁴ handwriting,⁴⁵ comparative typewriting,⁴⁶ psychological tests,⁴⁷ and motion picture demonstrations.⁴⁸ These matters considered in the subject of evidence to determine their admissibility and the method of use must of necessity deal with the quality of the proof produced.

CONCLUSION

The modern tendency of the law of evidence is to be far more liberal in the admission of testimony than in the past. Much

⁴²Wigmore, *Evidence*, 2nd ed., secs. 769-779.

⁴³Underhill, *Criminal Evidence*, 3d ed., ch. 51.

⁴⁴*State v. Campbell*; (1931) 213 Iowa 677, 239 N. W. 715.

⁴⁵See valuable recent book on handwriting and typewriting comparisons, Osborne, *Questioned Documents*, 2nd ed.

⁴⁶*Supra*, footnote 45.

⁴⁷See recent book on use of lie detector, Larson, *Lying and Its Detection*. For its rejection in court, see *State v. Bohner*, (1933) 210 Wis. 651, 246 N. W. 314, discussed in (1933) 18 MINNESOTA LAW REVIEW 76. On the use of psychology in trial, Wigmore, *Principles of Judicial Proof*, 2nd ed., McCarty, *Psychology for the Lawyer*.

⁴⁸*State, for Use of Chima v. United R. & Elec. Co.*, (1932) 162 Md. 404, 159 Atl. 916, 83 A. L. R. 1307

which was previously regarded as unsafe to submit to the jury because of the belief of their inability to evaluate it is now properly regarded as a part of the body of proof. Exceptions to the rules of exclusion have become so numerous in many instances that they have almost become the rule rather than an exception. The statutes creating new commissions or boards performing judicial functions, such as the workmen's compensation commission, have frequently eliminated the restrictions upon admissibility of evidence and have permitted all testimony to be introduced for whatever it is worth. Either by statute or judicial decision the future is sure to eliminate further barriers of evidence. Enlarging the scope of admissible testimony, however, does not eliminate the significance of the principles back of the exclusionary rules, which were based upon what was believed to be dangerous possibilities from the admission of such testimony. The majority of these principles will be as essential to a proper understanding of the law as they have been in the past, but will be transformed from reasons for exclusion to tests of reliability of the testimony admitted and of the credibility of witnesses permitted to testify. It is the understanding and comprehension of the principles of evidence held by the bench and bar of this country which would prevent a chaotic condition in the problems of proof if evidence should become freely admitted as in continental Europe. Although, as stated by Professor Wigmore, the principles of admissibility have practically monopolized the study of evidence while the problem of proof has been virtually ignored,⁴⁹ it is believed that the effect of this study has been to create conceptions for testing evidence offered as proof which have indirectly contributed much to an appreciation of probative values and characteristics of admitted testimony.⁵⁰

To point out the close relationship of the principles of admissibility of evidence to the problem of proof and the need of a consciousness of the dual function of the ideas dealing with admissibility has been the purpose of this article. The use of evi-

⁴⁹Wigmore, *Principles of Judicial Proof*, 2nd ed., 3.

⁵⁰This is recognized by Professor Morgan in his very favorable review of Professor Wigmore's *Principles of Judicial Proof*, when he says, "The M. Jordan of the bar will discover that he has been practicing un-awares many of the principles which it enunciates." He then says, "but even the most astute trial practitioner, unless he has made an unusually comprehensive examination of the whole field, will be forced to admit that he has constantly overlooked many factors of vital importance in the solution of problems of proof." (1931) 31 Col. L. Rev. 1229.

dence when admitted, its strength and its weakness, its association with other testimony, its part in solving the problem of proof are believed to be logically connected with the study of the right to consider the testimony in the process of proof. The case of *Funk v. United States*,⁵¹ with the development of the law preceding it, shows the direction in which the law is moving. It also shows the need of a wider perspective and a closer analysis of the principles back of the law of evidence as they relate to the use of evidence in the trial after admission. The courts only say that the principles which formerly excluded witnesses and testimony shall hereafter be used to test weight and credibility. The method⁵² by which this is to be accomplished requires re-examination of the principles of evidence as they become involved, with attention directed to the use of the evidence in trial rather than its exclusion from trial.

⁵¹(1933) 54 Sup. Ct. 212.

⁵²The result of the analysis of the principles of evidence in the problem of proof will undoubtedly be most effectively applied in the following ways: 1. In direct and cross-examination it should enable counsel to bring to light more effectively and appreciably the strength and the weakness of admissible testimony. 2. It should aid in the discovery of the sources of contradictory or rebuttal testimony and illuminate the points of attack. 3. In argument to the jury the reasons, ideas and principles urged to the court to admit or exclude the evidence, or to hold a witness competent or disqualified, or to recognize or reject sufficiency of evidence to make a case, are, perhaps, presented in different language, but they are among the most forceful arguments to convince and persuade the triers of fact in the solution of the problem of proof.